NO. 87-1122

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IN THE
SUPREME COURT OF THE UNITED STATES

*

OCTOBER TERM, 1987

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CROWLEY MARITIME CORPORATION, et al.,
Petitioners,

versus

SHEREEN RAMONA ZIPFEL, et al.,
Respondents.

*

BRIEF SUGGESTING THAT THE PETITION BE HELD IN ABEYANCE AS TO PETITIONERS' FIRST GROUND AND BRIEF IN OPPOSITION TO PETITIONERS SECOND GROUND FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

I.

Whether - in view of the fact that this Court has already granted certiorari in ***Chick Kam Choo, et. al. v. Exxon Corp., et al.***, No. 87-505, Supreme Court, cert. granted, 108 S.Ct. 343 (Nov. 16, 1987), Ct of Appls, 817 F.2d 308 (5 Cir. 1987), a case which conflicts with the holding of the Court of Appeals in this case that a federal district court, which has dismissed a maritime case on ground of forum non conveniens, is precluded by the Anti-Injunction Statute, 28 U.S.C. 2283, from enjoining a state court in which the same case has been subsequently filed, from adjudicating the case; oral arguments in ***Chick Kam Choo*** are scheduled for March; and Petitoners in ***Chick Kam Choo*** have agreed to allow Petitoners in this case to file an amicus curae brief in ***Chick Kam Choo*** - it would be in the interest of judicial economy and justice to defer

decision on the first question presented for review in this case, pending this Court's decision in *Chick Kam Choo*?

II.

As to the second reason given by Petitioners for granting certiorari, whether - in view of the fact that the assertions in the two cases (*In re Air Crash Near New Orleans, Louisiana*, 821 F.2d 1147, 1164 n.25 [5 Cir. 1987] and *Cruz v. Maritime Co. of Philipines*, 702 F.2d 47 [2 Cir. 1983]) which Petitioners cite as being in conflict with the Court of Appeals holding in this case that the application of the Jones Act, 46 U.S.C. 688, deprives the district court of the discretion to dismiss the case on grounds of forum non conveniens, constitute nothing more than dicta and, in any event, the opinion of the Court of Appeals on that issue is clearly correct - it would be appropriate to grant certiorari in this case?

PARTIES BELOW

The parties to the proceedings below were

Plaintiffs:

Shereen Ramona Zipfel, Individually and as Administratrix of Ian Charles Zipfel, deceased; Ten Fong Craig, Individually and as Administratrix of the Estate of William Henry Craig, deceased; Chan Luck Chee; Vyner Gerard Albuquerque; and Patrick Paul Grunke.

Defendants:

Crowley Maritime Corporation; Brinkerhoff Maritime Drilling Corporation; Brinkerhoff Maritime Drilling Corporation S.A.; Brinkerhoff Maritime Drilling Corporation PTE, Ltd; Conoco, Inc.; Halliburton Company; Atlantic Richfield Company; Arco Oil & Gas Corp.; McClelland Engineers, Inc.; and Oceaneering International, Inc.

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versus

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF SUGGESTING THAT THE PETITION BE HELD IN ABEYANCE AS TO PETITIONERS' FIRST GROUND AND BRIEF IN OPPOSITION TO PETITIONERS SECOND GROUND FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents respectfully request that point one of the Petition be held in abeyance and that the Petition be denied as to point two.

OPINIONS BELOW

The Petition adequately sets forth the opinions below.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

The Petition adequately sets forth the statutes involved.

STATEMENT OF THE CASE

The Respondents agree with the Statement of the Case by Petitioners (Petition at pp. 2-4) except insofar as it fails to contain or conflicts with the following:

1. While the district court found that the base of operations of the Brinkerhoff I was in the Far East, there was substantial evidence that decisions directly and indirectly affecting its operation were repeatedly made in San Francisco and Los Angeles.

2. It was undisputed that the owner and operator of the Brinkerhoff I was Brinkerhoff Maritime Drilling Corporation ("BMDC"), an American Corporation with its

home office and corporate base of operations in San Francisco.

3. It was further undisputed that the Brinkerhoff I flew the American flag and its home port was San Francisco. In addition, it had a sailing history of moving from American waters to various and changing locations in the South China Sea, Java Sea and Malacca Straits.

4. It was undisputed that two of the five seamen involved in these cases, Grunke (Australian) and Craig (American), were directly employed by BMDC and, while the other three, Zipfel (English), Chee (Singaporean) and Albuquerque (Singaporean), were nominally employed by subsidiaries of American corporations, there was a fact issue as to whether Zipfel, Chee and Albuquerque were the de-facto employees of BMDC because of its ultimate control over the vessel on which

they were serving.[1]

5. The Brinkerhoff I was drilling pursuant to a contract between BMDC and Atlantic-Richfield Indonesia, Inc. ("ARII"), an American corporation with its home office in Los Angeles, which provided that all disputes arising out of the Brinkerhoff I's activities would be decided under American, "California, U.S.A." law; the seamen plaintiffs and decedents were third-party beneficiaries of such choice-of-law clause.

6. The place of crash and injury, on land in Indonesia, was fortuitous; the trip during which the plane crashed proceeded over land in Singapore, thence over international waters, and thence over land in Indonesia.

7. The district judge who first presided over the cases in the district court,

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1. See ***Spinks v. Chevron***, 507 F.2d 216 (5 Cir. 1975) and ***Baker v. Raymond International, Inc.***, 656 F.2d 175 (5 Cir. 1988).

Aguilar, J., after extensive briefing and argument, held that the Jones Act applied to *all* of the seamen who were serving on the Brinkerhoff I and who were injured or killed in the crash; interlocutory appeal, though certified on the choice-of-law question by Judge Aguilar, was twice declined by the Ninth Circuit; as the cases were being prepared for trial on the merits and almost two years after they were filed, they were transferred to Schwarzer , J, who, despite Respondents vigorous contentions that Judge Aguilar's ruling on the applicability of the Jones Act was the "law of the case", reversed Judge Aguilar on the applicability of the Jones Act to the foreign seamen; and that holding of Judge Schwarzer was affirmed by the Court of Appeals.

8. The Texas state court actions of the plaintiffs were filed almost simultaneously wth the filing of the federal actions and were allowed to remain

dormant through a mutual understanding among counsel for the parties (that the state court suits would not be activated until after the federal district court decided whether it would accept jurisdiction).[2]

9. As we argue below, the decisions in *In Re Air Crash Disaster Near New Orleans, Louisiana*, 821 F.2d 1147, 1164 n.25 (5 Cir. 1987) and *Cruz v. Maritime Co. of Philippines*, 702 F.2d 47 (2 Cir. 1983), do not truly conflict with the decision of the Court of Appeals in this case - that the application of the Jones Act precludes dismissal on grounds of forum non conveniens - because the language employed by the courts of appeals in those cases

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2. One of the important reasons why suits were filed in the Texas state court is that the home offices of the parent corporations of the nominal subsidary employers of Zipfel, Albuquerque and Chee (Halliburton Company, Oceaneering International, Inc. and McClelland Engineers, Inc., respectively) were *all* in Texas.

was clearly dicta and the issue decided by the Court of Appeals in this case was *not* an issue that was squarely before the *New Orleans Air Crash* and *Cruz* courts and was not an issue, the resolution of which was necessary to a disposition of those cases.

Reasons Why The Court Should Defer Deciding Whether To Grant Certiorari On The Injunction Question And Should Deny Certiorari On The Jones Act/Forum Non Conveniens Issue.

A. We Respectfully Request and Suggest That The Court Should Defer Deciding Whether To Grant Certiorari On The Injunction Question Until After The Court Has Decided *Chick Kam Choo v. Exxon*, No. 87-505, Supreme Court, cert granted 108 S.Ct. 343 (Nov. 16, 1987), Ct of Appls, 807 F.2d 307 (5 Cir. 1987).

In the *Chick Kam Choo* case pending in this Court, Petitoners Brief has already been filed and the parties have been notified that oral argument will probably take place in March of this year.

Obviously, it would not serve the interests of justice or an economy of justice to grant certiorari in this case on the injunction question and either have two separate presentations of the issue before the Court or delay the determination of the ***Chick Kam Choo*** case so that ***Zipfel*** could be consolidated with ***Chick Kam Choo.*** We respectfully suggest that this would be an appropriate case in which to defer consideration of the Petition filed herein, particularly on the injunction question, until ***after*** the Court has decided the ***Chick Kam Choo*** case.

The Petitioners in this case could in no way be prejudiced by such deferral, particularly since they have requested consent from the Petitioners and Respondents in ***Chick Kam Choo*** to file an amicus curiae brief in ***Chick Kam Choo***, and both parties have consented. Thus, the Petitioners in this case will have the opportunity to present to this Court their views on the injunction question.

B. As to the Jones Act/Forum Non Conveniens Issue, Certiorari Should Be Denied.

The holding of the Court of Appeals that the application of the Jones Act compels the district court to deny a forum non conveniens motion is not one concerning which certiorari should be granted for these important reasons: First, there are no true conflicts among the circuit courts with regard to "decisions", as distinguished from dicta, on the issue. Second, a resolution of the issue will have no precedential value. Third, the Court of Appeals clearly decided the issue correctly.

1. There is no true conflict among the circuit courts.

The Petitioners assert that certiorari should be granted primarily because of a perceived "conflict" between the decision of the Court of Appeals in this case and the dicta of the courts of appeals in *In*

Re Air Crash Disaster Near New Orleans, Louisiana, 821 F.2d 1147, n.25 (5 Cir. 1987), and *Cruz v. Maritime Co. of Phillipines*, 702 F.2d 47 (2 Cir. 1983) and with an alleged innuendo of this Court in *Piper Aircraft Corp. v. Reyno*, 654 U.S. 235 (1981).

The Court of Appeals below squarely held that the district court had erred in dismissing the claim pertaining to the American seaman on ground of forum non conveniens because, since the Jones Act, 46 U.S.C. 688, applied to the American seaman's claim, "dismissal for forum non conveniens is precluded." A19-A23. That holding was absolutely indispensable to the result reached - without that holding, as the Court of Appeals observed, the dismissal by the district court of the American seaman's claim on ground of forum non conveniens could very well have been upheld. A19, A20.

But, in *Cruz* and *In Re Air Crash Near New Orleans*, the gratuitous observations that a district court is free to dismiss a seaman's case on ground of forum non conveniens even though the Jones Act applies to the case were totally irrelevant to the result reached. In *Cruz*, a **per curiam** decision, the Jones Act had been found not to apply and, therefore, the discussion as to whether or not the application of the Jones Act precludes a dismissal on grounds of forum non conveniens, 702 F.2d at 48, had absolutely no possible bearing upon the result reached. See Comments in **Edelman**, 15 Jl. of Maritime Law and Commerce 517, 530 (1984).

And the comments of the Fifth Circuit in *Air Crash Near New Orleans* are truly shocking. After seven years and at least eighteen decisions in the Fifth Circuit alone, the Circuit - without the question being in issue, apparently

without it being briefed or argued, without the interests of maritime plaintiffs or defendants being a party or in any way represented - resorted to a mere footnote in a case involving an aircrash on land and not related to maritime rights or the Jones Act in any way, in which to sweep away those seven years and eighteen cases of solid and consistent authority to the effect that a federal court has no discretion to dismiss a case on grounds of forum non conveniens when the Jones Act applies. See Ftnt. 25 at p. 1163, 1164 and the listing of maritime cases which were summarily stated to be overruled. Not only was the infamous footnote 25 rank dicta but it seems inherently improper to choose a non-maritime case in which to attempt such a radical departure from past precedent.

Lastly, the petitioners' reference to *Piper Aircrart v. Reyno*, 454 U.S. 235 (1981), Petition at 13, 14, centers upon

the discussions by the district court in this case of ***Piper***, A-53 to A-58, and its very strained view that ***Piper*** "inferentially rejected the notion that forum non conveniens does not apply to cases under the Jones Act", A-56, A-57, because of the ***Piper*** Court's rejection of a quote in the Court of Appeals opinion (630 F.2d at 163-164), which had in turn quoted from a Jones Act case, ***DeMateos v. Texaco, Inc.***, 562 F.2d 895, 899 (3 Cir. 1977), cert den., 435 U.S. 904 (1978). This view, it seems clear, is entirely wrong because it ignored the clarification sentence which immediately followed the referred-to quote, such sentence making it perfectly clear that this Court's rejection of the Third Circuit quote was based upon the conclusion that, in a land-based aircrash, plaintiffs may not automatically "defeat a motion to dismiss on the ground of forum non conveniens merely by showing that the substantive law

that would be applied in the alternative forum is less favorable to the plaintiffs, than that of the present forum". 454 U.S. at 246, 247. The law involved in *Piper* was the common-law of Scotland. The *Piper* case did *not* address, directly or indirectly, the issue decided by the Court of Appeals in this case: whether, if a federal statute containing special venue provisions applies to the case, a federal court is nevertheless authorized to disregard such Congressionally enacted special venue provisions and dismiss the case on the basis of the common-law doctrine of forum non conveniens.

We submit that the dicta in *Cruz* and *In Re Air Crash Near New Orleans* and the alleged "inferential" expressions in *Piper* are not "decisions" at all and certainly not the kinds of "decisions" that produce the kind of "conflicts" which would justify the granting of certiorari.

Supreme Court Rule 19(1), 28 U.S.C.A., defines and delimits those situations in which the Court will grant certiorari and the Rule describes the one assertedly applicable here as when "a court of appeals has rendered a decision (not a dicta) in conflict with the decisions (not dicta) of another court of appeals on the same matter." id. As far back as 1897, the Court discussed its certiorari power as one that "will be sparingly exercised" and "only" where it is clear that the case is one that is appropriate for certiorari intervention. *Forsyth v. Hammond*, 166 U.S. 506, 513-515 (1897). Indeed, this Court has dismissed a writ of certiorari previously granted on the ground that the court of appeals decision conflicted with the decision of another court of appeals when it was determined that in fact a conflict did not truly exist. *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180 (1959). And a reading of typical cases in

which the Court has granted certiorari on the basis of conflicts amoung the circuit courts or a circuit court conflict with decisions of the Supreme Court demonstrates that the "conflicts" which this Court deemed sufficient for the invocation of certiorari jurisdiction were direct and true conficts upon the merits of the ultimate issue and not conflicts involving dicta or inferential language. See e.g. ***Buffaloe Forge Co. v. United Steelworkers of America***, 428 U.S. 397, 404 (1976); ***U.S. v. ITT Continental Baking Co.***, 420 U.S. 223, 225 (1975); and ***Marks v. U.S.***, 430 U.S. 188 (1977).

In fact, there is no conflict at all among the court of appeals' cases in which the question of whether the application of the Jones Act compelled retention of jurisdiction directly affected the outcome of the case and the decision reached. See ***Antypas v. Cia Maritime San Basilio, S.A.***, 541 F.2d 307 (2 Cir. 1976), cert den. 429

U.S. 1098 (since Jones Act held to apply, "a district court has no power to dismiss on grounds of forum non conveniens", id. at 310); ***DeMateos v. Texaco, Inc.***, 562 F.2d 895 (3 Cir. 1977), cert den. 435 U.S. 904 (dismissal of maritime case on grounds of forum non conveniens proper because Jones Act did not apply; ". . . we conclude that the district court, recognizing that American law would not apply, was justified in dismissing the complaint because the Eastern District of Pennsylvania is an inappropriate forum"; id.. at 899-903); ***Fisher v. Agios Nicolaos V***, 628 F.2d 308 (5 Cir. 1980), cert den. 454 U.S. 816 (since Jones Act applied, court had no discretion to dismiss on grounds of forum non conveniens; ". . . for similar forum non convenens reasons, if United States law is applicable, the American court should retain jurisdiction rather than relegate the controversy to a foreign tribunal;" id. at 315, 317, 318);

DeOlivera v. Delta Marine Drilling Co., 707 F.2d 843, 845-847 (5 Cir. 1983)(reversing holding of district court that Jones Act applied and, only because Jones Act did *not* apply, thence ordered dismissal on grounds of forum non conveniens; ". . . if United States law applies, a federal court should entertain the suit"; id. at 845); *Ali v. Offshore Co.*, 753 F.2d 1327 (5 Cir. 1985)(reversed because district court, in dismissing on grounds of absence of subject matter jurisdiction, erred in failing first to directly consider whether the Jones Act applied, and if it found that the Jones Act did not apply, then, and only then, consider whether to dismiss on grounds of forum non conveniens; id. at 1330, 1334); *James v. Gulf International Marine Corp.*, 731 F.2d 886 (5 Cir.1984), subs. dec. 777 F.2d 193 (5 Cir. 1985)(reversed because the district court's finding that the Jones Act did not apply was based on

"insufficient facts" and remanded so that facts could be sufficiently developed concerning that issue, the court of appeals noting that, if the Jones Act applied, the district court's dismissal on forum non conveniens grounds would be erroneous); *In re McClelland Engineers, Inc.*, 742 F.2d 837 (5 Cir. 1984) and *McClelland Engineers Inc. v. Munusamy*, 784 F.2d 1313 (5 Cir. 1986)(issuing de facto mandamus and then reversing because district court did not first determine whether the Jones Act applied before denying the forum non conveniens motion, indicating that such determination could not be deferred because, if it applied, the district court would have been correct in denying the motion but, if the Jones Act did not apply, it probably would be error to deny the forum non conveniens motion, 742 F.2d at 838, 839 and 784 F.2d at 1317-1320); *Nicol v. Gulf Fleet Supply Vessels*, 743 F.2d 289 (5 Cir. 1984)

(reversing because the district court, in dismissing for failure to state a claim, erred in failing to directly address the question of whether the Jones Act applied and did not correctly assess the effect of the occurrence of the accident outside the territorial waters of any nation; the court observed that if the Jones Act applied the court "should retain jurisdiction". id. at 293-298); ***Szumlicz v. Norwegian America Lines, Inc.***, 698 F.2d 1192 (11 Cir. 1983) (affirming conclusion of district court that because Jones Act applied, "the case should not be dismissed for forum non conveniens", id. at 1195); ***Needham v. Phillips Petroleum Co. of Norway,*** 715 F.2d 1481 (10 Cir. 1983)("If American law is applicable to the case, the forum non conveniens doctrine is inappliable."); and ***Bartholomew v. Universe Tankships, Inc.***, 263 F.2d 437 (2 Cir. 1959), cert den. 359 U.S. 1000(holding that since the Jones Act applied, "the

court's power to adjudicate must be exercised;" id. at 443).[3]

The above cases are the *only* court of appeals decisions that had to address the issue of how the application of the Jones Act impacts upon the forum non conveniens question in order to decide the case. And in each one of those cases, the Courts consistently held that, if the Jones Act applies, the district court has no discretion to dismiss the case on grounds of forum non conveniens; this, of course, is precisely the holding made by the court

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3. Other cases articulate the rule that the application of the Jones Act mandates retention of the case but the application of that rule was not necessary to reach the decision in those cases because the courts had found that the Jones Act did not apply and, therefore, the Jones Act's impact upon the forum non conveniens question was not in issue. See, e.g., *Chiazor v. Transworld Drilling Co., Ltd.*, 648 F.2d 1015 (5 Cir. 1981), cert den. 455 U.S. 1019; *Vaz Borralho v. Keydril*, 696 F.2d 379 (5 Cir.), reh. 710 F.2d 207 (5 Cir. 1983); *Pereira v. Utah Transport Inc.*, 764 F.2d 686 (9 Cir. 1985), cert dism'd 106 S.Ct. 1253 (1986); and the other cases cited in ftnt 25 in *In re Air Crash Near New Orleans*, 821 F.2d at 1163, 1164, not cited above.

of appeals in this case. See A-19 to A-23. Thus, it is plain that there is no conflict between the "decision" of the Court of Appeals in this case on the Jones Act/forum non conveniens question, and the "decision" of any other court of appeals that had to decide the issue. For that reason, Petition for certiorari should be denied on the second "question presented" by the Petitioners in this case.

2. The issue is virtually sui generis, not important save to the parties themselves and will not have any significant precedential effect.

Even if, *arguendo*, a district court had the power to dismiss even though the Jones Act applies, because of the criteria established by this Court in ***Lauritzen v. Larsen***, 345 U.S. 571 (1952); ***Hellenic Lines Ltd. v. Rhoditis***, 398 U.S. 306 (1970) and ***Romero v. International Terminal Operating Co.***, 338 U.S. 354 (1952) (the so-called ***Lauritzen-Romero-***

Rhoditis trilogy) for determining choice-of-law in a federal maritime case[4], the instances in which there would be sufficient contacts for the application of federal martime law and yet a forum non conveniens dismissal would still be justified under *Gulf Oil v. Gilbert*, 330 U.S. 501 (1947) and *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981)[5] would have to

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4. The Court of Appeals defined the Jones Act choice-of-law criteria as follows:

"The Supreme Court in *Lauritzen v. Larsen*, 345 U.S. 571, 583-92 (1953) listed seven factors to be considered in determining whether a claim is subject to the Jones Act: (1) place of the wrongful act; (2) the flag of the vessel; (3) allegiance or domicile of the injured party; (4) allegiance of the shipowner; (5) place and choice of law of the contract; (6) accessibility of a foreign forum; and (7) law of the forum. In *Hellenic Lines, Ltd. v. Rhoditis*, 398 U.S. 306, 308-309 (1970), the Court added an eighth factor: the shipowner's base of operations. In *Rhoditis,* the Court emphasized that the factors should not be applied in a mechanical fashion, and that the list is not exhaustive. *Id.*" See A-13 of Petition.

5. The Court of Appeals detailed the *Gilbert-Piper* criteria as follows:

"The private interest factors include: (1) relative ease of access to sources of proof; (2) availability of compulsory

be so rare as to defy the imagination. To be sure, the criteria for Jones Act, choice-of-law and federal forum non conveniens are not precisely the same (although there are some that are closely related, e.g., "accessiblity of a foreign forum" in choice-of-law and the existence of an "adequate alternative forum" in forum non conveniens) but the essence of those ultimate issues are the same. Thus, if the contacts with the U.S. are "substantial" enough for Jones Act application, this will almost necessarily

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process for attendance of unwilling witnesses, and cost of obtaining attendance of willing witnesses; (3) possibility of viewing subject premises; (4) all other factors that render trial of the case expeditious and inexpensive. (citation omitted).

The public interest factors include: (1) administrative difficulties from court congestion; (2) imposition of jury duty on the people of a community that has no relation to the litigation; (3) local interest in having localized controversies decided at home; (4) the interest in having a diversity case tried in a forum familiar with the law that governs the action; (5) the avoidance of unnecessary problems in conflicts of law. (citation omitted)." See A-18 of Petition.

mean the presence in the U.S. of at least an American flag state, owner of the vessel or base of operations (or, as in this case, the presence of all three) and in any of those instances that will mean that the vessel entity is positioned in the United States with the power to actually control the availability of the relevant witnesses and documents, wherever they may have been located initially (they usually are located in many different countries in international maritime accidents such as this one).[6]

Thus, the instances wherein the Jones Act applies but yet a forum non conveniens dismissal is appropriate, will be so rare that a decision by the Court on that narrow issue will have no precedential

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6. For example, the four depositions taken in this case with reference to choice-of-law and forum non conveniens were *all* taken in San Francisco and Los Angeles, California. The location of those depositions were selected by Brinkerhoff and ARII; the witnesses were there and all relevant documents were there.

value. In such circumstances, this Court normally denies writ of certiorari. See ***Milliken v. Bradley***, 433 U.S. 267, 298 (1977)(Powell, J. concurring)(writ improper given "unique circumstances" of case) and ***Rudolph v. U.S.***, 370 U.S. 269, 270 (1962)("review would be of no importance save to the litigants themselves").

3. In any event, the determination of the impact of the Jones Act on the forum non conveniens question by the Court of Appeals is eminently correct.

The unusual thing about the Court of Appeals' decision in this case is that it is the ***first*** court of appeals to thoroughly articulate the proper basis for the rule that the application of the Jones Act makes the doctrine of forum non conveniens inapplicable. Many courts, as discussed above, had applied the rule but had never really touched upon the proper reason for it. But the Court of Appeals in this case did:

In any event, however, we find the decisions of the Fifth, Tenth and Eleventh Circuits which preclude dismissal of a Jones Act case for *forum non conveniens* to be persuasive. This view is buttressed by decisions of the Supreme Court in which the Court has commented upon the unavailabiity of *forum non conveniens* as a basis for dismissal of cases filed under the Federal Employers' Liability Act (FELA). In *Gilbert*, the Court stated: "It is true that in cases under the Federal Employers' Liability Act we have held that plaintiff's choice of a forum cannot be defeated on the basis of *forum non conveniens*." 330 U.S. at 505. The Court in *Gilbert* cited *Baltimore & Ohio R. Co. v. Kepner*, 314 U.S. 44 (1941) for this proposition. In *Kepner*, the Court stated that the "privilege of venue, granted by the legislative body which created this right of action [under the FELA], cannot be frustrated for reasons of conveniens or expense." 314 U.S. at 54. The Jones Act incorporates the FELA, 46 U.S.C. Sec. 688(a), and both the Jones Act and the FELA have specific venue provisions. The FELA provides in relevant part:

> Under this chapter an action may be brought in a district court of the United States, in the district court of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing the action.

45 U.S.C. Sec. 56.

The portion of the Jones Act which pertains to jurisdiction and venue provides:

> Jurisdiction in [actions under the Jones Act] shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

46 U.S.C. Sec. 688(a).

In view of the Supreme Court's comments as to the unavailability of the *forum non conveniens* doctrine in FELA cases, the degree of similarity between the specific venue provisions under the Jones Act and under the FELA, and the incorporation of the FELA into the Jones Act, we believe that the *forum non conveniens* doctrine should be unavailable as a ground for dismissal under the Jones Act as it is under the FELA. (*Cf. La Seguridad v. Transytur Line*, 707 F.2d 1304, 1310, n. 10 (11 Cir. 1983) (suggesting that Congress implicitly spoke to, and rejected, the *forum non conveniens* doctrine in both FELA and Jones Act cases); *and see Dalla v. Atlas Maritime Co.*, 562 F.Supp. 752, 757 (C.D.Cal. 1983) ("[W]hen a seaman has a cause of action based on American law, he comes by right into American courts."), *aff'd* 771 F.2d 1277 (9 Cir. 1985). Finally, we see no reason to depart from the clear weight of authority in those circuits which have considered this question. We hold that when the Jones Act applies to a seaman's claim, that claim may not be dismissed on the ground of *forum non conveniens*.

See A-21 to A-23 of Petition. In this case, suit was filed in the district court where the Jones Act defendant, Brinkerhoff, has its "pricipal office", namely San Francisco, Caifornia. This is precisely one of places of venue Congress statutorily gave to the Jones Act plaintiffs in this case. Therefore, the district court had no discretion to reject venue in favor of a foreign forum.

The rule referred to in ***Gulf Oil v. Gilbert***, citing ***Baltimore & Ohio v. Kepner***, was further explained by this Court in ***U.S. v. National City Lines***, 334 U.S. 573 (1947). In that case this Court held that the comon law doctrine of forum non conveniens is not available in a case filed in accordance with Sect. 12 of the Clayton Act,[7] which provides for venue in civil antitrust proceedings. 334 U.S. at 574, 575, 578, 596, 597. The Court noted

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7. 38 Stat. 730, 736, c. 323, 15 U.S.C.A. Sect. 22, 4 F.C.A. Title 15, Sect. 22 (Oct. 15, 1914).

that ***Gulf Oil v. Gilbert*** had just been decided by a divided Court and that it involved only the ***general*** venue statute. id. at 597, 598. (per Jackson, J., concurring). It then proceeded to decide the issue of whether cases filed in accordance with Congressionally enacted special venue statutes are subject to the judge-made doctrine of forum non conveniens.[8] In reaching its decision, this Court stated pertinently:

> In the face of this history we cannot say that room was left for judicial discretion to apply the doctrine of forum non conveniens so as to deprive the plaintiff of the choice given by the section. That result, as other courts have concluded, would be utterly inconsistent with the purpose of Congress in conferring the broader range of choice. Tivoli Realty v. Interstate Circuit (CCA 5th Tex, 1948), 167 F2d 155; Ferguson v. Ford Motor Co. (DC SD NY) April 21, 1948) 77 FSupp 425.

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8. The Court defined the issue before it as follows:
"The principle question, and the only one we find it necessary to consider, is whether the choice of forums given to the plaintiff by Sect. 12 is subject to qualification by judicial application of the doctrine of *forum non conveniens*."
92 L.Ed.2d at 1586.

In this view of Congress' action, numerous considerations of policy urged by the appellees as supporting the discretionary power's existence and applicability become irrelevant. Congress' mandate regarding venue and the exercise of jurisdiction is binding upon the federal courts. Const Art 3, Sec. 2. Our general power to supervise the administration of justice in the federal courts, cf. McNabb v. United States, 318 U.S. 332, 87 L ed 819, 63 S Ct 608, does not extend to disregarding a validly enacted and applicable statute or permitting departure from it, even in such matters as venue.

* * * * *

Finally, both appellees and the Distict Court have placed much emphasis upon this Court's recent decisions applying the doctrine of forum non conveniens and in some instances extending the scope of its application. Whatever may be the scope of its previous application or of its appropriate extension, the doctrine is not a principle of universal applicability, as those decisions uniformly recognize. At least one invariable, limiting principle may be stated. It is that whenever Congress has vested courts with jurisdiction to hear and determine causes and has invested complaining litigants with a right of choice among them which is inconsistent with the exercise by those courts of discretionary power to defeat the choice so made, the doctrine can have no effect. Baltimore & O. R. Co. v. Kepner, 314 U.S. 44, 86 L. ed 28, 62 S Ct 6, 136 ALR 1222; Miles v. Illinois C. R. Co. 315 US 698, 86 L ed 1129, 62 S Ct 827, 146 ALR 1104.

334 U.S. at 588, 589, 596 and 597.

This Court's citation in ***National City Lines*** of the ***Kepner*** and ***Miles*** cases (both FELA cases) demonstrates the intent of this Court that FELA and Jones Act (which springs from the FELA) cases will be controlled by the rule enunciated in ***National City Lines*** concerning special venue statutes."

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9. The Petitioner's not-so-veiled attempt to distinguish ***Kepner*** because it did not involve the doctrine of forum non conveniens, is misleading. The question was whether a state court could enjoin a federal court in another jurisdiction, despite the fact the proceeding in such other federal jurisdiction was (for purposes of the decision) inconvenient. The Court stated the issue this way:

> "The real contention of petitioner is that despite the admitted venue respondent is acting in a vexatious and inequitable manner in maintaining the federal court suit in a distant jurisdiction when a convenient and suitable forum is at respondent's doorstep."

314 U.S. at 51. Thus, the question turned on "inconvenience" as does forum non conveniens and whether, assuming a forum given the plaintiff by the FELA is inconvenient, the court can be permanently enjoined from proceeding in that forum precisely because the forum is inconvenient, which is no different from having the case dismissed because the forum is inconvenient.

After ***National City Lines***, Congress enacted 28 U.S.C. 1404(a), which provides that:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

In ***Ex parte*** Collette, 337 US. 55 (1948), the Court addressed the question of how the newly enacted 28 U.S.C. 1404(a) impacted upon Sect. 6 of the FELA. The Court held that 28 U.S.C. 1404(a) did ***not*** effectuate a repeal of Sect. 6 of the FELA, 337 U.S. at 60, 61, but that an FELA action could be removed to another federal district for the convenience of the parties and witnesses as provided for in 28 U.S.C. 1404(a). But the Court made it perfectly clear that it was modifying ***Kepner*** and ***Miles only*** to the extent of 28 U.S.C. 1404(a) - that is forum on conveniens principles could be applied only with respect to transfers between

federal district courts, because Congress had statutorily permitted such transfers. There is nothing in ***Collette*** which holds or implies that the enaction of 28 U.S.C. 1404(a) could provide a basis for the transfer of an FELA or Jones Act suit, filed in a venue specifically provided for in the FELA or Jones Act, to a foreign forum pursuant to the common-law doctrine of forum non conveniens.

Indeed, there is much to the contrary in ***Collette***. The Court quoted the pronouncement in ***Kepner*** that if any modification were to be effectuated with respect to the holding in ***Kepner***, "the remedy is legislative." 337 U.S. at 60, 61. And Congress responded by modifying the holding ***only*** with respect to transfers between federal district courts of the United States Courts and did ***not*** include or discuss modifying ***Kepner*** to allow transfers or dismissals for trial in a more convenient ***foreign*** forum. id. at 61.

It can thus be presumed that Congress did not intend, in enacting 28 U.S.C. 1404(a), to allow FELA and Jones Act cases, and other cases filed pursuant to special venue statutes, to be subject to dismissals to foreign countries pursuant to the common-law doctrine of forum non conveniens. And Congress has not, since ***Kepner*** and ***Miles***, in any way, expressly or impliedly, seen fit to amend the venue provisions of the Jones Act or FELA to make those venue provisions subject to the common law doctrine of forum non conveniens for trial in a more convenient foreign forum.[10]

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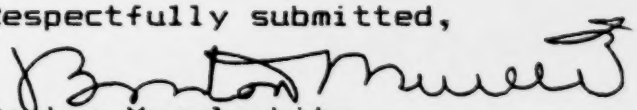
10. We should note the recent case of ***Transunion Corp. v. Pepsico Inc.***, 811 F.2d 127 (2 Cir. 1986), which held that the special venue provisions of RICO, 18 U.S.C. Sec. 1961-1968 (1982), were subject to the doctrine of forum non conveniens. But the Court there misconstrued ***Cruz*** and, rather than accepting the fact that - since the Jones Act did not apply in that case - the ***Cruz*** court's comments about Jones Act cases being subject to forum non conveniens were nothing more than dicta, the ***Transunion*** court persisted in citing ***Cruz*** as authority and in making a weak and inadequate attempt to distinguish ***National City Lines***. 811 F.2d at 130.

In sum, not only is the holding of the Court of Appeals that the application of the Jones Act requires the district court to retain the case and not dismiss on grounds of forum non conveniens consistent with all circuit courts that have decided the question rather than expostulating unnecessary dicta, but it is consistent with the decisions of this Court. Thus, the writ of certiorari with respect to the second question presented by Petitioners should be in all things denied.

Respectfully submitted,



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